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NWLC Leads Amicus Brief Challenging Anti-Trans Sports Ban in West Virginia



*****UPDATE: VICTORY!***** The Fourth Circuit held that West Virginia violated B.P.J.'s Title IX rights. It recognized that West Virginia subjected B.P.J. to gender discrimination in school sports—which Title IX prohibits. It also held that the district court was wrong to say that West Virginia won on the Equal Protection Clause argument at this stage, and sent the case back to the district court for further factual development.

On April 3, 2023, the National Women's Law Center (NWLC) and our law firm partner Hogan Lovells US LLP and 52 organizations committed to gender justice, led an amicus brief in *B.P.J. v. West*

NWLC Leads Amicus Brief Challenging Anti-Trans Sports Ban in West Virginia - National Women's Law Center

Virginia State Board of Education, in support of a 12-year-old transgender girl who challenged West Virginia's anti-trans sports ban. (B.P.J. is identified by initials to protect her privacy).

We are supporting B.P.J.'s appeal of a negative lower court decision and asking the U.S. Court of Appeals for the Fourth Circuit to uphold existing precedent that Title IX and the U.S. Constitution protect the rights of all LGBTQI+ students to access education free from discrimination.

The Case

B.P.J. is a middle-school student athlete in West Virginia who grew up in a supportive environment and benefitted from trans-inclusive and gender-affirming health care—meaning she is not being forced to go through an incorrect puberty. In April 2021, West Virginia enacted House Bill 3293, a discriminatory law banning trans girls (in sixth grade through college) from participating in school sports consistent with their gender identity.

At the time the law was created, and today, there are no known instances of any openly trans girls playing middle or high-school sports in West Virginia besides B.P.J. herself. Extremist lawmakers rallied support for this bill through their typical baseless fearmongering, falsely claiming that trans girls “threaten girls sports” while simultaneously ignoring the serious discrimination that women student athletes are actually facing.

When B.P.J. was 11 years old she wanted to try out for her middle school's cross-country team to have fun, learn new skills, and spend time with friends, like any other kid who chooses to play sports. But to do that, she and her family first had to challenge this discriminatory law in court.

In July 2021, the West Virginia federal district court issued an initial positive ruling temporarily protecting B.P.J. from the discriminatory law. This allowed her to play school sports while the case was pending in court.

Unfortunately, a few months ago, the same district court made a negative decision, wrongly finding that West Virginia **could** exclude B.P.J. as a trans student. The court analyzed Title IX incorrectly and didn't follow binding precedent by the Fourth Circuit, which had previously recognized in Grimm that Title IX protects LGBTQI+ students from discrimination, meaning this West Virginia law is likely illegal.

B.P.J. and her counsel at the ACLU are now asking the Fourth Circuit to reverse the district court's incorrect decision, and to uphold the existing precedent finding that Title IX and the Equal Protection Clause protect the rights of all LGBTQI+ students. And now, in a shameful attempt to harm **one** pre-teen girl, the state of West Virginia is using the (increasingly active) "shadow docket" practice to ask the Supreme Court to intervene on this one narrow issue of whether she can play while her case is appealed to the Fourth Circuit.

Our Brief

Our amicus brief explains how anti-trans sports bans are deeply connected to sex stereotypes that harm **all** girls and women, including cisgender women (meaning women who identify with their assigned sex).

Opponents of LGBTQI+ equality have recently attempted to score political points by demonizing transgender and nonbinary student athletes, especially trans girls as a "threat to girls' sports"—but we know from over a decade of data (collected 2008-2019) that these attacks are simply lies. Initial research in states that implemented trans-inclusive sports policies shows more girls overall are playing sports. On the other hand, states with hostile policies designed to bully transgender and nonbinary students see *fewer* girls playing school sports in total.

The enforcement of anti-trans sports bans often include dangerous and unscientific "sex testing" schemes that create new risks of sex harassment and assault against student athletes, which can involve anything from collecting sensitive

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medical documents to needless, traumatizing genital examinations (link). Athletics bans especially target Black and brown women (who face increased body policing and gender scrutiny based on racialized stereotypes of femininity) and intersex women and girls (who are born with natural variations in sex-linked characteristics).

Gender equity includes making sure that transgender girls and all girls are protected in education. If West Virginia is genuinely interested in addressing and preventing sex discrimination in school and women's sports, there are many areas that need attention including:

- Unequal participation opportunities—*like the 1.3 million fewer team spots available to high-school girls compared to high-school boys.*
- Second-class funding and resources for girls' and women's sports teams—*did you know Division I schools only spend \$1 on women athletes for every \$2 spent on men athletes?*
- Racial disparities resulting in fewer school sports opportunities for girls of color
- Sex-based harassment of student athletes
- Unequal pay for women athletes—*even when they outperform men's teams.*

NWLC advocates for the rights of trans girls, cis girls, and all LGBTQI+ students because we know that when the government enforces sex stereotypes, everybody loses. We will keep fighting for core civil rights protections in our schools so that all students can learn and grow in safety.

NWLC and our 52 supporting signatory organizations urge the Fourth Circuit to follow its strong, existing precedent—and recent precedent from the Supreme Court—to protect B.P.J. and all LGBTQI+ students from discrimination.

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